NOTES

The H–2A Farmworker: The Latest Incarnation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights

ALEJANDRO V. CORTES*

I. INTRODUCTION

Imagine yourself, twenty–four years old, in a strange country far from home, and barely understanding the language spoken around you. You work, isolated far from the community, for an employer that treats you as worthless and replaceable. In fact, your employer pays as if you are worthless and replaceable. However, not even a broken arm can keep you from going to work. This is the story of Cesar, a migrant worker who broke his arm on the job.[1] Cesar went to work because he knew his employer would not put him on worker's compensation, and because Cesar needed the money.[2] Cesar's broken arm, however, slowed him down, and one day his employer, irritated with Cesar's work productivity, fired him for being slow and lazy. Cesar was fired indiscriminately, for no reason at all.[3]

This is the typical story of a migrant farmworker, such as an H–2A worker. Part II of this Note will examine the background of the guest worker program in the United States, illustrating the inherent vulnerability and dependency that guest workers are subject to when they enter into an employment relationship with a domestic farmer. Part III will discuss why there is an urgent need to reform the current H–2A program. Specifically, Part III will examine the remedies available to H–2A workers and discuss how cultural and institutional barriers create inadequate remedies and options

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* The Ohio State University Moritz College of Law, J.D. 2005; Boston College, B.A. 2002. With deep love I would like to thank my parents, Antonio and Maria for sacrificing so much for me to succeed. Thanks to my brothers and sisters, Victoria, Victor, Margarita, Marcos, Hernan, and Carlos for helping and encouraging me to achieve my goals.

[1] *See* Denise Grollmus, *Racial Slurs? Unpaid Overtime? Indiscriminate Firings? Welcome to Ed's Farm*, SCENE, Dec. 15, 2004, at 2, *available at* http://www.clevescene.com/issues/2004-12-15/news/feature.html.

[2] *See id.*

[3] *See id.*

for H–2A workers. Part IV will provide a general overview of pending legislation aimed at reforming the H–2A program. This Part will review both the key aspects of the legislation, such as the right to sue in federal court and the mediation option, and the drawbacks of these proposed reform measures. Part V will discuss the process of mediation, what mediation is and why it will be a beneficial course of action for H–2A workers. It will also draw upon the use of mediation in sexual harassment employment disputes—a dispute comparable to H–2A farmworker employment dispute. It will focus on the core aspects of mediation and integrate them into a working example of mediation's benefits to employee and employer labor disputes. Finally, Part VI will discuss instituting a viable mediation program and will offer a recommendation to improve the proposed mediation provision.

II. HISTORICAL BACKGROUND OF THE H–2A GUEST WORKER PROGRAM

A. *The Bracero Program*

The concept of foreign guest workers originated with the *bracero* program that began at the outbreak of World War II.[4] Because of the war, United States farmers faced a shortage of employees.[5] To combat the shortage of agricultural workers, Congress created the Emergency Farm Labor Program—the Bracero Program.[6] The Bracero Program was a bilateral agreement between the United States and Mexico that brought Mexican workers into the United States to perform seasonal agricultural work, filling the agricultural workforce gap caused by World War II.[7]

The Bracero Program afforded Mexican workers certain protections including "payment at the prevailing rate, guaranteed work for at least 75 percent of the contract period, protection against discriminatory acts, guaranteed transportation, housing, [and] food ..."[8] Despite these rights and

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[4] "The official purpose of the Bracero Program was to bring Mexican workers to alleviate the declared shortage of domestic workers during World War II . . . ." Holley, *infra* note 16, at 583.

[5] Laura C. Oliveira, *A License to Exploit: The Need To Reform the H–2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153, 157 (2002).

[6] Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 84 (2004).

[7] JAMES D. COCKCROFT, OUTLAWS IN THE PROMISED LAND: MEXICAN IMMIGRANT WORKERS AND AMERICA'S FUTURE 67 (1986); *see also* Bustos v. Mitchell, 481 F.2d 479, 482 (D.C. Cir. 1973) (discussing generally the origins of the Bracero Program).

[8] Baker, *supra* note 6, at 84.

protections growers routinely exploited Mexican workers.[9] Exploitation took many forms, such as contracts written in English despite the fact that many of the Braceros did not speak English.[10] This form of exploitation subjected Braceros to the power of their employers[11] because Braceros did not know their rights due to their inability to speak or understand English.[12] Another form of exploitation was the unauthorized deduction of taxes from worker paychecks.[13] Finally, the Braceros did not have the right to negotiate their wages.[14]

The Bracero Program was designed as a temporary fix; once the work contracts and temporary visas expired, the Braceros were required to return to Mexico.[15] However, the Bracero Program continued as the shortage of domestic workers ended, despite the fact that the program was intended only to serve as a temporary remedy.[16] The new program, like the original program, was temporary in design and also included similar limitations that were intended to serve as safeguards against program abuse[17] and worker

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[9] The exploitation of foreign guestworkers common under the Bracero Program is also found under the current H–2A program. *See infra* Part III of this Note (discussing the reform of the current H–2A guest worker program and the similarities between H–2A guest workers and Braceros. This injustice results from the uneven bargaining power between the foreign guest workers and the agricultural growers. *See* Holley, *infra* note 16).

[10] *See* Oliveira, *supra* note 5, at 158.

[11] *See id.* (citing MARIA HERRERA-SOBEK, THE BRACERO EXPERIENCE: ELITELORE VERSUS FOLKLORE 39–74 (1979)).

[12] *See id.*

[13] Pam Belluck, *Mexican Laborers in U.S. During War Sue for Back Pay*, N.Y. TIMES, Apr. 29, 2001, at A1. As part of the Bracero Program, ten percent of wages were supposed to be deducted and held in savings accounts. *Id.* The purpose of this tax was to provide the Braceros with money on their return to Mexico. *Id.* The agreement called for U.S. banks to remit the money to Mexican banks, which would then distribute the funds to the returning Braceros. *Id.*

[14] *See id.*

[15] *See* Oliveira, *supra* note 5, at 158 (citing ROBERT B. TAYLOR, A STUDY IN THE ACQUISITION & USE OF POWER: CHAVEZ AND THE FARM WORKERS 67 (1975)).

[16] *See* Michael Holley, *Disadvantaged By Design: How The Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 583–84 (2001).

[17] *See id.* at 584. The renewed Bracero Program prohibited agricultural employers from using foreign workers to displace domestic workers. *Id.* In fact, when "Congress passed Public Law 78, which re-established the Bracero Program, [it] reiterated [the program's] bedrock principle: to avoid causing adverse effect on domestic workers or their working conditions." *Id.* Agricultural employers could only hire Braceros if they offered domestic workers the same work at the same terms as Braceros, certified that they could not get domestic workers to fill the farm jobs, and obtained Labor Department

abuse.[18] These safeguards were not effective[19] and agricultural employers abused both the program and workers.[20] In the 1960s Congress realized the plight of the migrant farmworker and ended the program.[21] Along with the demise of the Bracero Program came better protections for migrant farmworkers such as unionization[22] and protection under the federal law.[23]

B. *The H–2A Guest Worker Program*

At the same time that the Bracero Program was re-established, Congress introduced a new program related closely to the Bracero Program—the H-2 guest worker program.[24] Like the Bracero Program, the H–2 program was also designed as a temporary fix to labor shortage.[25] Foreign workers

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approval of the prevailing wage being paid to Braceros. *See* ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 47 (1964). Braceros could not be imported into the United States if a shortage of domestic workers did not exist. However, if agricultural employers hired Braceros, they were entitled to certain rights.

[18] To prevent abuse and a system of cheap labor, Braceros were entitled to a prevailing wage. *See* GALARZA, *supra* note 17, at 47–48.

[19] *See generally* GALARZA, *supra* note 17, at 199–200 ("[S]tatements of policy had little connection with the real state of affairs."). *Id.* at 218. Applying the safeguard provisions was ineffective because at the time of the Bracero Program, the Department of Labor did not have the manpower to determine the actual prevailing wage for farmworkers, which led the Department of Labor to adopt a prevailing wage as determined by the agricultural employers. *Id.* at 199–200, 203. By depreciating the foreign worker wages, the agricultural growers displaced domestic workers. *See id.*

[20] The lack of adequate enforcement procedures allowed agricultural growers to abuse foreign workers, and this abuse also resulted from their vulnerability. *See id.* at 199–200. Abuse occurred because agricultural growers imported more foreign workers than they needed, gave them minimal work, over-charged for meals, and provided squalid housing. *See id.* at 183–97. Factors that made Braceros vulnerable to abuse included, among other things, language barriers, Braceros' necessity to earn a living, and the fact that a majority of Braceros paid bribes and fees for a chance to work in the United States. *See id.*

[21] *See* Holley, *supra* note 16, at 585.

[22] Because of the horrible working conditions afforded Bracero workers, organizations such as the United Farmworkers and Texas Farmworkers Unions organized to protect farmworker rights. *See* F. ARTURO ROSALES, CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 130–51, 215–25 (1996).

[23] *See* Holley, *supra* note 16, at 585–86. *See also infra* notes 58–65 (discussing generally the protections afforded migrant farmworkers and how those rights greatly exceed the rights of H–2A guest workers).

[24] *See* Oliveira, *supra* note 5, at 161–62.

[25] *See* 8 U.S.C. § 1101 (a)(15)(H)(ii) (1988). The statute authorized the Attorney General to approve visas for temporary foreign workers if unemployed persons capable of performing such service or labor cannot be found in the United States. *See id.*

received temporary visas only if there were no unemployed persons capable of performing the agricultural jobs in the United States.[26] However, as the sentiment against foreign labor increased in this country,[27] Congress reshaped the H–2 program by separating agricultural jobs from non-agricultural jobs.[28] The new H–2A program encompassed agricultural jobs only.[29] Once again, the purpose of the H–2A program was to assure adequate labor supply while simultaneously protecting domestic jobs.[30]

1. *The Current H–2A Program*

Under the current H–2A program, the United States Department of Labor regulates the application process for the authorization and importation of foreign guest workers.[31] The Department of Labor certifies and approves the petitions of H–2A guest workers.[32] Before certification is granted agricultural employers must meet certain statutory standards. For certification to occur there must be no "sufficient . . . able, willing, and qualified" [33] United States workers available to perform the temporary and

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[26] *See* 8 U.S.C. § 1101(a)(15)(H)(ii) (2002). Like the Bracero Program, the main principle behind the H–2 program was to ensure that the use of foreign workers did not harm domestic workers. Employers could not pay foreign workers below the Adverse Effect Wage Rate (AEWR). *See* 8 C.F.R. § 214.2(h)(3) (2002). The AEWR was the rate that would have existed if there were not an increase in foreign labor, or simply the rate a grower would pay a domestic worker. *See* AFL–CIO v. Brock, 835 F.2d 912, 913 (D.C. Cir. 1987).

[27] During this time groups opposed to immigration and in support of greater immigration controls lobbied Congress for a change. *See* Oliveira, *supra* note 5, at 162. To curb the rise of illegal immigration, the Immigration Reform and Control Act of 1986 imposed both civil and criminal penalties against employers who hired illegal immigrants. *See* 8 U.S.C. § 1324a(e)(4)(A) (2002).

[28] *See* 8 U.S.C. §1101(a)(15)(H)(ii) (2002). Congress amended the Immigration and Nationality Act, which contained the H–2 program in the Immigration Reform and Control Act of 1986.

[29] *See id.* at §1101(a)(15)(H)(ii)(a) ("[A]n alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . .").

[30] Oliveira, *supra* note 5, at 163 (citing Rogers v. Larson, 563 F.2d 617, 626 (3d Cir. 1997)) (discussing the policy reasons behind using temporary workers).

[31] *See* 20 C.F.R. § 655.90(a) (2002).

[32] *See id.* at § 655.90(b).

[33] *See id.* at § 655.90(b)(1)(A) ("There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition . . . ."); *see also* Elton Orchards, Inc. v. Brennan, 508 F.2d 493, 499–500 (1st Cir. 1974) (interpreting the statute to mean that domestic workers should be given priority over foreign workers).

seasonal agricultural services for which an employer desires to import nonimmigrant foreign workers. Also, the employment of foreign workers must not adversely affect the wages and working conditions of United States workers.[34] As part of the H–2A program, employers are required to provide free housing without charge to the workers,[35] and three meals a day or cooking facilities where workers can prepare their own meals.[36] Employers are required to reimburse transportation costs or provide transportation to the workers.[37] The statute also required employers to provide free insurance,[38] a copy of the employment contract,[39] statements reflecting hours worked and wages received for the day,[40] and to guarantee employment for at least three-fourths of the workday.[41]

III. THE NEED TO REFORM THE H–2A PROGRAM

Although it seems that H–2A workers benefit greatly from these mandatory conditions, they are actually greatly disadvantaged because their rights are rarely enforced.[42] Just like the Braceros of a different era, H–2A workers face the same barriers, both cultural and institutional.

A. *Cultural Barriers*

Part of what makes the H–2A program very attractive to growers, and thus more susceptible to abuse, is the vulnerability of the H–2A worker to his or her employer.[43] A characteristic of the H–2A program shared with the

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[34] *See* 20 C.F.R. § 655.90(b)(1)(B) (2002) ("The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."); *see also* Williams v. Usery, 531 F.2d 305, 306 (5th Cir. 1976) (stating that wages paid to foreign workers must not adversely effect the economy).

[35] *See* 20 C.F.R. § 655.102(b)(1) (2002).

[36] *See id.* at § 655.102(b)(4).

[37] *See id.* at § 655.102(b)(5)(i).

[38] *See id.* at § 655.102(b)(2).

[39] *See id.* at § 655.102(b)(14).

[40] *See id.* at § 655.102(b)(8).

[41] *See id.* at § 655.102(b)(6).

[42] *See* Holley, *supra* note 16, at 594. "Basically, H–2A workers only have a remote possibility of protecting their employment rights because they have no connection to effective institutions to enforce those rights." *Id.*

[43] Growers prefer to hire temporary foreign workers over domestic workers because foreign farmworkers are easy to house since they travel without families. *See* Cecilia Danger, *The H–2A Non-Immigrant Visa Program: Weakening its Provisions Would be a*

Bracero Program is that the H–2A guest workers are subject to the absolute authority of their employers.[44] Unlike domestic workers, H–2A workers cannot go from job to job.[45] In addition to this indentured servant–like employment,[46] H–2A foreign workers are treated as pariahs and are not

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Step Backward for America's Farmworkers, 31 U. MIAMI INTER-AM. L. REV. 419, 430 (2001). Foreign workers are also the preferred choice because they are often in extreme economic need, which allows employers to manipulate wages. *See id.*

[44] Like the Bracero Program, H–2A workers travel great distances from their homes to a culturally different community and live in isolation. *See id.* However, unlike the Bracero Program, the H–2A program is not a government-to-government recruitment program, but rather the recruitment process is handled by private agents and Mexican officials. *See id.* at 576. Because private parties and Mexican officials handle the selection process, prospective H–2A workers are sometimes forced to pay unauthorized fees or bribe officials in order to be selected. *See* Jen McCaffery, *Virginia's Migrants Easily Exploited*, ROANOKE TIMES, Dec. 10, 2000, at A1. The majority of prospective H–2A workers also lack any form of savings, and the process of securing employment in the United States leaves many H–2A workers in large debt. *See id.* H–2A workers for the most part, work in the United States in order to pay off their debts and this prevents them from doing anything that could risk their employment. *See* Holley *supra* note 16, at 596. In fact, debt has been defined as an "ingenious substitute for the chain and whip of the slave driver." *See* AMBROSE BIERCE, THE DEVIL'S DICTIONARY 28 (1958). Because of the need to pay off their debts, H–2A workers are subject to the absolute authority of their employers who can fire them at will. *See* Holley, *supra* note 16, at 597; *see also infra* note 45 (discussing the consequences of employment termination).

[45] An H–2A visa binds H–2A workers to the employer whose contract secured their temporary admission to the United States. *See* HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 47 (2000) (characterizing the H–2A program as a restricted work force). Because of the inability to switch jobs, H–2A workers must return to their home countries if they quit or are fired, or face deportation if caught in this country illegally. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(A) (2002) ("an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor . . . ."). The statute only authorizes temporary admission into the United States to perform agricultural labor. Accordingly, once the worker is fired or quits their temporary visa expires. *See id.* In addition, H–2A workers cannot negotiate wages with employers. Oliveira, *supra* note 5, at 169; *see also* Holley, *supra* note 16, at 595.

> Unlike any other farmworker in the United States, an H–2A worker is tied to a single employer. An H–2A worker is not authorized to work for any employer except the one whose contract allowed the worker to gain temporary admission to the United States. If the work is insufficient, the employer is abusive, or the housing intolerable, the H–2A worker does not have the option of finding another job during the remainder of the work visa; his only option is to tolerate it or quit and return immediately to have his native country.

Id.

[46] *See* Holley, *supra* note 16, at 595.

considered part of the community in which they live.[47] In some instances the communities in which the H–2A workers live have become violent, such that H–2A workers have been beaten.[48]

H–2A workers generally lack basic understanding of English, which makes it more difficult for them to assert their rights and exacerbates their vulnerability.[49] Without any basic understanding of the English language, it is often more difficult for these workers to know of the social and legal services available to them.[50] Additionally, H–2A workers face another major obstacle when attempting to assert their rights or complain about treatment—an angry and vengeful employer. A common practice among agricultural employers is retaliation against H–2A workers who complain about their rights.[51] Retaliation leads to a blacklisting of H–2A workers by agricultural employers and recruitment services.[52] Even if some of these cultural barriers

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[47] *See* Charlie Leduff, *Immigrant Workers Tell of Being Lured and Beaten*, N.Y. TIMES, Sept. 20, 2000, at B1. For example, some residents of Farmingville, NY, feel that "[immigrant workers] are responsible for all kinds of problems, from a decrease in property values to a spiraling crime wave . . . ." *Id.*

[48] *See id.* Physical attacks on immigrant workers are called bias crimes. *See id.* Because of hard financial circumstances, attackers lure immigrant workers by promising them work and then physically assaulting them. *See. id.*

[49] *See* Holley, *supra* note 16, at 595.

[50] *See id.* H–2A workers do not know of the services available to them because they live and work in isolation from the community, and because their employers employ practices that prevent legal and social service providers from coming in contact with the workers. *See id.* at 597. For example, North Carolina employers (1) forced H–2A workers to burn "Know Your Rights' Manuals" provided by Legal Service Lawyers, *see* Human Rights Watch, *supra* note 45 at 148; (2) conditioned free housing on the waiver of the right to receive visitors at the provided housing; *see id.* at 147; and (3) used local sheriffs to keep out legal service lawyers, *see id.* at 155. *See also* Sunil Bhave, *Opening the Courtroom Doors for Migrant Workers: The Need for A Nationwide Service of Process Amendment to the Migrant and Seasonal Agricultural Worker Protection Act*, 47 ST. LOUIS U. L.J. 899, 940 (2003). Bhave discusses the struggles of migrant workers who are usually illegal immigrants and not covered under the H–2A program. *Id.* However, both types of workers are similar in their everyday struggles, such as abusive employers. *See supra* note 43 (discussing generally the reason why employers prefer to hire foreign guest workers—that is their susceptibility to manipulation). A majority of migrant farmworkers lack any understanding of English, and place little importance on education. For the migrant worker, education is irrelevant. *See id.*

[51] *See* Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 n.73 (5th Cir. 1985) (citing legislative history and recognizing that the crucial purpose of such anti-retaliation clauses is to help farm workers overcome a general background of fear and intimidation caused by widespread practice of retaliation against those who complain about violations).

[52] *See id.*

can be overcome, H–2A workers are fearful of employer retaliation, and are not likely to complain about working conditions.[53]

B. *Institutional Barriers*

The law has turned a blind eye toward the plight of the H–2A worker.[54] Statutes and regulations that were intended to protect farmworkers actually work to the disadvantage of the H–2A worker.[55] The structure of the laws regarding the H–2A program make H–2A workers even more vulnerable than undocumented migrant workers, who have considerably more rights than H–2A workers.[56]

1. *Ineffective Administrative Remedies*

The responsibility of enforcing H–2A workers' employment contracts falls under the purview of the Department of Labor.[57] To enforce H–2A

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[53] *See* Oliveira, *supra* note 5, at 173. An H–2A farmworker's temporary visa terminates if they are fired from their job, and this obligates them to return to their home countries. *See supra* note 45. Because of the fear of retaliation prominent among H–2A workers, the latter part of this Note will explore the use of mediation in sexual harassment disputes, which also has among its victims a fear of employer retaliation for seeking redress through the court system.

[54] "There is nothing new under the sun: growers are once again seeking to employ only persons who, *due to handicaps created by law*, are so disadvantaged that they have no choice but to continue working regardless the conditions of employment." Holley, *supra* note 16, at 593–94 (emphasis in original).

[55] *See infra* notes 57–66 and accompanying text (discussing the ineffectiveness of the Department of Labor regulations).

[56] One of the main differences between undocumented migrant workers and H–2A workers is the Migrant and Seasonal Agricultural Workers' Protection Act (AWPA). AWPA provides undocumented migrant workers access to the federal courts by creating federal subject matter jurisdiction over such claims. *See* 29 U.S.C. § 1854(a) (2002); *see also* Holley, *supra* note 16, at 586. AWPA also gives these migrant farmworkers the ability to establish venue in any court where personal jurisdiction exists over the defendant. *See* 29 U.S.C. § 1854(a) (2002). Also, AWPA has anti-retaliation provisions to protect farmworkers from employer retaliation. *See* 29 U.S.C. § 1855(a) (2002); *but see* Bhave, *supra* note 50, at 900 (arguing that once a migrant worker returns to his home state it will be difficult to assert personal jurisdiction over his former employer because of the lack of minimum contacts needed to establish personal jurisdiction in the migrant worker's home state).

[57] *See* 8 U.S.C. § 1188(g)(2) (2002) ("The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.")

workers' employment contracts, the Department of Labor issues regulations that outline the procedures H–2A workers have available to them to resolve complaints against their employers.[58] However, these regulations are not mandatory; they are rarely enforced. The regulations allow for any person to report a violation of the employment contract obligation.[59] Once a complaint is received, the Department can investigate suspected violations, as it may deem appropriate.[60] The Department of Labor has at its disposal a variety of enforcement procedures. These enforcement procedures include the authority to deny labor certification to the grower,[61] institute an administrative hearing,[62] assess civil monetary penalties[63], or seek injunctive relief in the district courts.[64] In reality, however, these enforcement regulations are not effective deterrents or penalties because the regulations are discretionary. This discretionary procedural system creates a weak enforcement system. As one commentator has noted:

> [t]here are no time tables or deadlines applicable to the Labor Department's action upon receipt of a complaint. In fact, the Labor Department has neither an obligation to institute proceedings in response to a complaint, nor must it notify the complainant that it has taken action or has declined to take action in response to the complaint.[65]

Although an enforcement system is in place, complainants cannot enforce their rights if their rights are not treated as being valid. Nor can complainants enforce their rights if they are left in limbo, wondering if a regulatory response is ever going to come.[66]

2. *Federal Law Also Does Not Provide an Adequate Remedy*

Absent under the H–2A program is the ability of aggrieved workers to sue in federal court through the Agricultural Worker Protection Act (AWPA), which reserves this right for domestic and undocumented workers

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[58] *See* 29 C.F.R. § 501.16–501.47 (2002); *see also Holley*, *supra* note 16, at 599

[59] *See* 29 C.F.R. § 501.5(d) (2002); *see also* Holley, *supra* note 16, at 599.

[60] *See* 29 C.F.R. § 501.5(a) (2002); *see also* Holley, *supra* note 16, at 599.

[61] *See* 29 C.F.R. § 501.16(a) (2002); *see also* Holley, *supra* note 16, at 599.

[62] *See* 29 C.F.R. § 501.16(b) (2002); *see also* Holley, *supra* note 16, at 599.

[63] *See* 29 C.F.R. § 501.19(a) (2002); *see also* Holley, *supra* note 16, at 599.

[64] *See* 29 C.R.R. § 501.19(a)(2002).

[65] *See* Holley, *supra* note 16, at 599.

[66] This system has been described as a black hole. *See id.* at 601.

only.[67] H–2A workers cannot sue in federal court under AWPA because AWPA explicitly excludes H–2A from its coverage.[68] Through passage of AWPA, "Congress decided that . . . migrant and seasonal farm workers [had] long been among the most exploited groups in the American labor force, [and that] they needed something more than an administrative enforcement scheme in order to adequately protect their rights."[69] This demonstrates that Congress recognized that to adequately protect migrant farmworkers' rights something more than administrative enforcement schemes were needed. However, the explicit exclusion of H–2A farmworkers from AWPA's protection leaves in place what AWPA abolished—an administrative enforcement scheme that at best can be characterized as a black hole.[70] As previously noted, the enforcement procedure available for H–2A workers does not necessarily result in an adequate remedy for employer violations because of its discretionary nature.[71]

The major difference between AWPA and the current H–2A guest worker program is that AWPA creates federal question jurisdiction over claims arising from AWPA.[72] Because federal courts have the ability to entertain these types of claims, migrant farmworkers are not dependent upon diversity jurisdiction to get their claim heard in federal court.[73] In contrast, H–2A farmworkers must rely on diversity jurisdiction if they want their claims heard in federal court, which is virtually impossible to achieve.[74]

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[67] *See* 29 U.S.C. § 1802(8)(B)(ii) (2002) ("The term 'migrant agricultural worker' does not include . . . any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) . . . .") *Id.* This is the H–2A program. *See also supra* note 56 (discussing the rights afforded domestic and undocumented farmworkers under AWPA).

[68] *See* 29 U.S.C. § 1802(8)(B)(ii) (2002).

[69] Laura Lockard, *Toward Safer Fields: Using AWPA's Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L. & SOC. CHANGE 507, 535–36 (2004).

[70] *See supra* notes 57–66 and accompanying text (discussing generally the Department of Labor's administrative enforcement scheme of the H–2A program and how one commentator has referred to it as a black hole).

[71] *See supra* notes 57–66 and accompanying text (discussing the Department of Labor's regulations for enforcing H–2A employment contracts).

[72] *See surpa* note 56 (discussing the creation of federal subject matter jurisdiction over AWPA claims).

[73] *See id.*

[74] *See* Holley, *supra* note 16, at 608. Diversity jurisdiction is achieved when two parties to a lawsuit are from different states and if the claim meets the jurisdictional minimum of $75,000. *See* 28 U.S.C. § 1332(a) (2002). A dispute between a foreign H–2A worker and domestic U.S. grower would establish diversity between the parties. *See id.* § 1332(a)(2) (dispute between citizens of a state and citizens or subjects of a foreign

There would not be an urgent need to reform the H–2A program if Congress amended the AWPA to include H–2A workers.[75] There is no justification for excluding H–2A workers,[76] and exclusion has a great impact on H–2A workers.[77]

3. *Inadequacy of State Courts*

H–2A workers are shut out from the federal court system[78] and given practically no protection from the federal administrative system.[79] Because of these barriers, H–2A workers must rely on state contract and tort law to redress their grievances, but state courts offer inadequate protection.[80] This inadequacy exists because of the risk of local bias in state courts.[81] H–2A

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state). However, the problem created by diversity jurisdiction is that most claims brought by H–2A workers will not meet the jurisdictional minimum of $75,000. *See* Holley, *supra* note 16, at 608. Suing for damages under a breach of contract theory would be futile because at most, an H–2A farmworker's total income from the employment contract will be around $10,000, far less than the $75,000 minimum. *See id.*

[75] Amending AWPA would be a step in the right direction in reforming the H–2A guest worker program. However, in the context of undocumented migrant farmworkers, one commentator has stated that the "situation is not much better now that it was in the 1960s [before Congress passed AWPA]." DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 206 (1998). The passage of AWPA has not done much to change the position of migrant farmworkers because the rights they received under AWPA "have not been asserted so often as to put farmworkers' employment conditions on par with those of other unskilled laborers in the United States." Holley, *supra* note 16, at 587. There is no reason to believe that amending AWPA to include H–2A farmworkers under its protection would dramatically improve their rights. Something more should be done, and Parts IV, V, and VI of this Note will examine the benefits of using mediation to resolve H–2A farmworker labor disputes.

[76] The problems faced by domestic and undocumented workers are not different from the problems H–2A workers face. Domestic and undocumented workers "travel far from their homes to work in places where they are isolated from the community, are especially vulnerable to retaliation, and lack adequate access to legal services." Holley, *supra* note 16, at 605. *See also supra* notes 42–52 and accompanying text (discussing the problems faced by H–2A workers).

[77] *See supra* notes 43–45 (discussing the vulnerability of H–2A workers).

[78] *See supra* note 57.

[79] *See supra* notes 57–66 and accompanying text.

[80] "State courts are H–2A workers' firmest legal foothold in the country, but, at least in the eyes of farmworker, advocates, that foothold is far too unstable to be relied upon." Holley, *supra* note 16, at 608.

[81] *See id.* This is not to say that H–2A worker will be treated unfairly in all state courts, but there is a real risk of H–2A farmworkers encountering a bias against them. *See id.* The reason why diversity jurisdiction exists in the federal courts is to protect out-of-state litigants from state court biases. *But see* Neal Miller, *An Empirical Study of Forum*

farmworkers are mostly employed in rural agricultural regions, where bias is a real concern.[82] For example, an H–2A farmworker sent a letter through counsel explaining a breach of contract claim to a Kentucky farmer who prematurely terminated the worker's employment contract.[83] In response to this, the farmer filed suit in Kentucky State Court to preempt the H–2A worker from filing in Texas.[84] Establishing the forum in state court was important because of the potential use of bias against migrant farmworkers.[85]

The reason to establish Kentucky State Court as the forum of the dispute is because of the importance of tobacco in the state. Tobacco is king in the state, so it has the possibility of influencing both judge and jury.[86] Also chilling is the bias held by the community and state legislators against migrant farmworkers. One legislator testified to Kentucky's House State Government Committee that, "[w]henever [Hispanic immigrants] come into [the] community, those people bring quite a bit of disease with them."[87] This, coupled with the lack of adequate federal remedies, leaves H–2A farmworkers in a perilous position. Something must be done to remove the H–2A farmworker from this position—this "something" is the Agricultural Job Opportunity, Benefits, and Security Act of 2005.[88]

Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 AM. U. L. REV. 369, 426 (1992) (noting that modern commentators have suggested that that local bias is no longer a significant danger in today's state court systems). As noted, current federal law does not provide H–2A workers a private right of action to sue. When their substantive rights have been violated, there is complete diversity between foreign H–2A and domestic U.S. farm growers. *See* Holley, *supra* note 16, at 608.

[82] *See* Holley, *supra* note 16, at 609. A local bias is widely perceived to be a significant factor in litigation in southern state courts. *See* Miller *supra* note 81, at 412.

[83] *See* Holley, *supra* note 16, at 610 (citing Appellant's Brief at 3, Villegas-Alanis v. Wurth, No. 00-50399 (5th Cir. May 14, 2001)).

[84] *See id.* (citing Appellant's Brief at 9).

[85] By undertaking this action, the farmer ran the risk of violating the H–2A program's anti-retaliatory provision, but the risk was worth taking because of the importance of establishing Kentucky State court as the forum for the dispute. *See* Holley, *supra* note 16, at 610–11. What transpired in this Kentucky case is not different from what occurs in other states. In fact, attorneys in most southern states and the less industrialized Midwest take into account the stronger likelihood of local bias, which in turn affects their forum filing decisions in high proportions. *See id.* at 609.

[86] This is supported by the fact that state judges are elected, and eighty-one percent of citizens indicate that they believe their state court system is influenced by politics. *Id.* at 611–12.

[87] *Id.* at 612. One legislator described immigrants as "mostly . . . Mexicans who have caused problems." *Id.*

[88] Agricultural Job Opportunity, Benefits, and Security Act of 2005, S. 359, 109th Cong. (2005) [hereinafter "AgJobs 2005"]. Senator Craig first introduced AgJobs in 2003 as Senate Bill 1645.

IV. LEGISLATIVE REFORM OF THE H–2A GUEST WORKER PROGRAM

There is no doubt that the current H–2A worker program is flawed. These flaws have led to widespread abuse by agricultural growers against H–2A workers. However, Congress has recently taken the necessary steps to correct the injustice that is the H–2A program. During the 108th Congress, the Agricultural Job Opportunity, Benefits, and Security Act of 2004 (AgJobs) was introduced by Senators Larry Craig of Idaho (R), and Ted Kennedy of Massachusetts (D).[89] AgJobs would reform the H–2A worker program, and one of the amendments would allow a free mediation option for H–2A workers who have claims against their agricultural employer.[90]

A. *General Overview of the AgJobs Bill*

One of the major reform measures proposed is the creation of a private right of action in federal district court for aggrieved H–2A workers.[91] The right to seek relief in federal court to enforce H–2A farmworker rights is a great achievement. This right, however, is not as beneficial as it appears,[92] and the right to sue in federal court is disadvantageous for two reasons.

The first problem stems from the language of the AgJobs bill creating the private right of action in federal court. The proposed legislation allows for "[a]n aggrieved farmworker [to] sue for damages or equitable relief arising out of the denial of his right to housing, transportation, wages, the three-

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[89] *See Senate Bill To Authorize ADR For Farm Labor Claims Advances* (Sept. 30, 2004), www.adrworld.com/opendocument.asp?Doc=XiyxMGn8HE&code=jpA1Dv5q.

[90] *See id.*

[91] *See* AgJobs 2005, *supra* note 88; *see also* Agricultural Job Opportunity, Benefits and Security Act of 2004, S. 2823, 108th Cong. § 218C(c)(2) (2004) [hereinafter "AgJobs 2004"] ("An H–2A worker aggrieved by a violation of rights . . . by an agricultural employer or other person may file suit in any district court of the United States having jurisdiction of the parties . . . ."). *Id.*

[92] The private right of action allowed under AgJobs is similar in most respects to the private right of action under AWPA. AWPA allows for, and AgJobs proposes that an aggrieved person "may file suit in any district court of the United States having jurisdiction over the parties . . . ." *See id.*, concerning the AgJobs private right of action; *see also* 29 U.S.C. § 1854 (a) (2002), concerning AWPA private right of action. Although the private right of action is allowed for under the AgJobs bill, the same problem arises that exists under AWPA. *See* Bhave, *supra* note 50, at 900. Bhave discusses barriers to establishing minimum contacts over a defendant agricultural grower. In whatever forum the H–2A worker brings his or her suit, the forum court will need to establish personal jurisdiction over the defendant by finding that minimum contacts exist with the forum state. Minimum contacts will exist if the H–2A worker files in the defendant's home state. However, if an H–2A worker quits his job before bringing suit he is required by law to return to his home country. *Id.*

quarters guarantee, motor vehicle safety requirements, and certain other statutory terms and conditions of employment."[93] The legislation also provides "[t]he farmworker . . . [the right to] file suit against his employer for any retaliation the employer takes when he asserts his rights or participates in a proceeding to enforce the worker protections of the H–2A program."[94] Although a step in the right direction, these are the only claims upon which an aggrieved farmworker may sue.[95] The legislation is disadvantageous to H–2A farmworkers because the right to sue in federal court is limited to "claims arising out of the denial of [the] right to transportation, wages, and the three-quarters guarantee."[96] This eliminates the possibility of suing in federal court under contract and tort law. Thus a suit must be brought in state court, yet the bill specifies that suing in federal court is the exclusive right of action.[97]

The second problem relates to a legal system that may tend to have a bias toward Latino issues. Lat-Crit theorists postulate that the law consists of a Black/White paradigm: "the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White."[98] Lat-Crit theorists suggest that "[w]ithin this framework, a [Latino] perspective is devalued and the experiences particular to the [Latino] community are commonly excluded from mainstream jurisprudence."[99] An illustrative example of this devaluation is language and

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[93] *See* Baker, *supra* note 6, at 107.

[94] *Id.*

[95] *Id.*

[96] *See id.* at 110.

[97] *See supra* notes 80–87 and accompanying text (discussing the drawbacks of suing in state courts).

[98] *See* Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1103 (1997) (quoting Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1219 (1997)). LatCrit theorists argue that the conception of race in this country as Black and White operates to exclude and marginalize Latinos/as to the extent that Latino/a issues, such as farmworker rights, become invisible to mainstream society. *See id.* Indeed, farmworker legislation, including the current H–2A guest worker program and its interpretation and adjudication by judges favor growers while at the same time excluding farmworkers.

[99] *See* Guadalupe T. Luna, *Agricultural Hierarchy and the Legal Condition of Chicana/os in the Rural Economy* (The Julian Samora Research Inst., Mich. State Univ., Working Paper No. 37, 1997), *available at* http://www.jsri.msu.edu/RandS/research/wps/wp37.html. Generally, the law is presumed to be objective and neutral. *See id.* Under this assumption the law is supposed to lack cultural, political, or class characteristics, but on the other hand, alternative interpretations of the law are biased and non-objective. *Id.* It is evident then that "this purportedly objective standard neither lacks a perspective nor facilitates a non-biased

national origin discrimination under Title VII of the Civil Rights Act of 1964.[100]

Title VII of the 1964 Civil Rights Act outlaws employment discrimination based on, among other things, national origin.[101] Requiring employees to speak only English in the work place would appear to constitute national origin discrimination against bilingual Latinos.[102] However, it is settled federal law that English-only rules do not constitute national origin discrimination or even a prima facie case of discrimination.[103] In cases upholding English-only rules, courts have found that such rules are mere *inconveniences* toward Latino employees,[104] and do not significantly burden bilingual Latinos enough to amount to the denial of equal opportunity required by Title VII. Such a ruling is an example of judges manipulating the outcome of a particular case that affects Latinos or, in other words, the ability of judges to make Latino litigants and their injuries disappear.[105] Due to this manipulation of the law, Lat-Crit scholars argue that an alternative interpretation of law that "tak[es] into account the racially distributional impacts of a particular federal [law] may be required, in order to avoid perpetuating a racially identifiable set of harms.[106]

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perspective" and what is understood as objective or neutral embraces the "embodiment of a Euro-American, middle-and-upper middle class world." *See* Daniel A. Faber & Suzanne Sherry, *The 200,000 Cards of Dimitry Yrasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994). "The ability to manipulate the law's indeterminacy permits . . . judges to exonerate acts of anti-Latino/a discrimination and, in the process, to craft legal doctrine the renders Latinas/os ever more vulnerable to bigotry." Valdes, *supra* note 98, at 1131. This ability and the dualism of the Black/White paradigm make Latino ethnicities and identities invisible. *See id.* at 1108. A review of the current H–2A program illustrates the invisibility of H–2A farmworkers. *See supra* note 56 and accompanying text (discussing generally federal subject matter jurisdiction over AWPA claims); *see also supra* note 67 and accompanying text (discussing generally the exclusion of H–2A workers from the definition of migrant agricultural worker).

[100] *See supra* notes 101–05 and accompanying text (discussing generally Lat-Crit theory and national origin discrimination under Title VII).

[101] *See* 42 U.S.C. § 2000e-2 (a)(2) (2004).

[102] *See* Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 1347, 1347 (1998).

[103] *See id*; *see also* Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980); Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993). Both cases hold that English-only rules are not discriminatory.

[104] *See Spun Steak Co.*, 998 F.2d at 1488.

[105] *See* Cameron, *supra* note 102, at 1348.

[106] *See* Luna, *supra* note 99. This Note suggests that the utilization of mediation in the context of agricultural reform is an appropriate alternative to a biased legal system.

Because all H–2A workers are foreign, and because a majority of H–2A workers come from Latin American countries, the issues that affect them are deemed inconsequential and are largely ignored. Along with the private right of action, AgJobs also adds a very innovative provision, something not seen before in federal farm labor legislation—the mediation of disputes.[107]

V. THE PROCESS OF MEDIATION

Mediation can be used to reconcile the widely differing concerns among the actors in a case of an H–2A worker and employer dispute. Thus it is necessary to briefly describe what mediation is before assessing the value that mediation will have on farm worker disputes.

A. *Definition of Mediation*

Mediation is a form of alternative dispute resolution and is defined as "conciliation of dispute through the non-coercive intervention of a third party."[108] Mediation is "a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution."[109] What needs to be stressed about mediation is the fact that it is *non-coercive* and *facilitated by a neutral third party.* These key characteristics are especially important in the context of H–2A worker disputes.[110] The process of mediation will alleviate fears that H–2A workers

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[107] *See* AgJobs 2005, *supra* note 88; *see also* AgJobs 2004, *supra* note 91, § 218C(c)(1) ("Upon the filing of a complaint by an H–2A worker aggrieved by a violation of rights . . . a party to the action may file a request with the Federal Mediation and Conciliation Service to assist the parties in reaching a satisfactory resolution of all issues involving all parties to the dispute."). *Id.*

[108] *See* Mark R. Privratsky, Comment, *A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska*, 75 NEB. L. REV. 91, 94 (1996).

[109] *Id.* (quoting KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES & PRACTICE 16 (1994)).

[110] *See supra* notes 43–45 (discussing generally the vulnerability of H–2A workers to abuse and the unequal bargaining power between H–2A farmworkers and their agricultural employers). Because of this negative experience, a neutral third party will alleviate any fears that H–2A workers might have. *See* FOLBERG & TAYLOR, *infra* note 112, at 38–40 (discussing the process of mediation and how the mediator through the caucus session works to establish the trust of the parties). It is during this session that any fears that H–2A workers may have can be alleviated. In order to alleviate fears of H–2A workers a transformative approach to mediation should be taken. "In transformative mediation, the goal is to alter the parties' relationship, by increasing understanding of the other party's position and introducing improved communication between the parties, as well of course as resolving the specific dispute between the parties." Sara Adler,

may have, and is better suited to resolve disputes in the context of the H–2A program. As one court has noted: "Courtrooms are not the best place to prevent or remedy a hostile work environment."[111]

Mediation traditionally begins with an initial joint session with all the parties present.[112] Next, the parties proceed with opening statements, without interruption from the other parties, giving the mediator an overview of the dispute.[113] The mediator then proceeds to caucus with each party separately, during which time the mediator works with each party to define the central issues and to gain the trust of the parties.[114] Once the issues are defined, the primary goal is to generate options for resolving the dispute.[115] These proposed resolutions become the focus of the mediation, and the parties, with the help of the mediator, evaluate those options and negotiate an acceptable solution.[116] The mediation session is completed when the parties draft an agreement into a written contract signed by both parties.[117]

Mediation has many benefits, and the benefits of mediation have been accepted by a wide variety of institutions.[118] Mediation is important and beneficial because it creates a better communication system between disputants and their employers.[119] In addition to the prospect of building

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Strategies for a Successful Employment Mediation, MEDIATE.COM, Nov. 2000, http://www.mediate.com/articles/sadler.cfm. This approach should be used because the H–2A worker most likely will seek to stay employed by the farmer-employer and transformative mediation is best suited to work out labor disputes.

[111] Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 465 (N.J. 1993).

[112] *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION 39–41(1984).

[113] *See id.* at 41–43.

[114] *See id.* at 38–40.

[115] *See id.* at 49–50.

[116] *See id.* at 53–58.

[117] *See id.* at 60–62.

[118] Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 574 (2004). Mediation is now an integral part of the civil litigation system. Both state and federal courts have mediation or other ADR programs, public agencies embrace mediation, and private sector corporations and organizations are using mediation to resolve disputes. *See id.*

[119] *Id.* at 591–92. Because of language and other cultural barriers, creating a better communication system between H–2A workers and agricultural growers will be beneficial. An example of increased communication is the United States Postal Service's Resolve Employment Disputes, Reach Equitable Solutions Swiftly (REDRESS) program. This program succeeded in enhancing communication by excluding mediator evaluations—e.g., "you have no case." Under this model, "mediators are directed to focus on supporting and facilitating parties efforts to shift their conflict interactions by using the opportunities for empowerment and recognition that arise as a conflict unfolds." *Id.* at 592 (internal quotations omitted); *see also* James R. Antes et al., *Transforming Conflict*

better communication between employee (farmworker) and employer (farmer), the cost associated with mediation is another reason to use mediation in farm labor disputes. Resorting to mediation is faster and costs less than traditional litigation methods.[120] This is beneficial to individuals such as H–2A workers who lack the necessary funds to obtain legal assistance in the traditional sense.[121] It should be noted again that the mediation provision of AgJobs is free to either party to the dispute.[122]

B. *Putting Mediation Principles to Work In the H–2A Program*

Using mediation to resolve labor disputes in the farm labor context is not a novel issue. The Farm Labor Mediation Project created by the Oregon Department of Agriculture (ODA) is an example of mediation used in farmworker disputes with agricultural employers. Oregon recognized that farm labor disputes are "a highly emotional and often poorly understood arena of labor concerns."[123] The rationale of each party is typically as follows:

> Farm worker advocates often contend that farm workers are underpaid, live in unfit housing, are treated unfairly, and are exploited. Many farmers respond that they have good relationships with their employees and that they provide many extra benefits that go unnoticed, such as free transportation, food, and, in some instances, housing. Farmers feel that Legal Services Corp., which represents farm workers, sometimes takes on frivolous claims to harass employers, creating an antagonistic atmosphere for political purposes. As a result, farmers have spent thousands of dollars

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Interactions In The Workplace: Documented Effects Of the USPS REDRESS ™ Program, 18 HOFSTRA LAB. & EMP. L.J. 429, 429 (2001).

[120] Sherry R. Wetsch, *Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys*, ARMY LAW., June 2000, at 8, 8.

[121] *See* Holley, *supra* note 16, at 613. Legal representation of H–2A workers predominately comes from Legal Services Corporation (LSC). However, LSC grants only provide $10.00 per client, and on average only $150 is spent per client. This illustrates the impracticality of H–2A workers filing suit in court against a well-funded opponent who has the resources to wear them down. *Id*; *see also* ROTHENBERG, *supra* note 75, at 231. Restrictions placed on the type of services LSC can provide create other problems as well. For example, restrictions are placed on conducting outreach programs in other countries. *See* Holley, *supra* note 16, at 613.

[122] *See* AgJobs 2005, *supra* note 88; *see also* AgJobs 2004, *supra* note 91, § 218C(c)(1)(C). Congress has authorized that $500,000 be appropriated annually to the Federal Mediation and Conciliation Service to carry out the mediation provision. *Id.*

[123] Brent Searle, *The Use of Mediation for Resolving Agricultural Labor Disputes*, http://www.sipa.columbia.edu/cicr/ejournal/archive/research/mediation.html (last visited Dec. 16, 2005).

> defending themselves in court when they believe they might have been able to reach agreements with workers in an informal setting.[124]

This discourse among farmworker advocates and agricultural employers became the impetus to craft an alternative dispute resolution procedure to address costly and time-consuming legal remedies for farm labor disputes.[125]

The use of mediation in agricultural labor disputes is based on certain assumptions. These assumptions are:

- "Both grower and farmworker(s) have a mutual interest in resolving employment disputes locally in a speedy and inexpensive manner."[126]
- "Mediation is voluntary, confidential, and informal. It is not intended to compromise the legal rights of either side."[127]
- "Discussion of differences between parties can lead to a better understanding of both points of view and may help to prevent future disagreements from developing."[128]
- "Mediation is a voluntary process; neither party may be forced to mediate [an] issue."[129]
- "Either party may withdraw from mediation at any time without further obligations."[130]
- With these understandings in mind, almost all types of farmworker disputes can be mediated—even sensitive issues.[131]

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[124] *Id.*

[125] "Of [the] 33 agricultural labor cases handled by the program in the past three years, 24 have been mediated and 23 of those cases have produced in an agreement—a 96% settlement rate." *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] The program encourages the use of mediation "to resolve any alleged violation of law relating to wages, hours, employment terms, working conditions, housing conditions when housing is provided by the employer, or charges of unfair or illegal treatment. Workers and employers are encouraged to discuss directly with each other any work-related or housing-related dispute." *Id.* These issues under the ODA Farm Labor Mediation Project mirror, almost exactly, the issues faced by H–2A workers. *See supra* notes 57–66 and accompanying text (discussing the rights of H–2A workers and the fact that they are not enforced).

C. *The Elements of Mediation*

1. *Process*

The mediation process is crucial to the success of the mediation program. For example, the ODA program encourages "[w]orkers and employers . . . to discuss directly with each other any work-related or housing-related dispute [and] [i]f a problem is not resolved, either party, or his legal representative, may request mediation."[132] Because mediation is voluntary, both parties need to agree on certain issues. For example, if a dispute proceeds to mediation, both parties have to mutually agree on the mediator.[133] Also important to the success of the mediation program is the understanding of the parties that the power to resolve the dispute resides solely with parties and not the mediator.[134]

In conjunction with this, the mediator must be knowledgeable in the field of farmworker labor disputes and if needed, the mediator must choose a competent interpreter.[135] "The choice of mediator is of paramount

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[132] *See* Searle, *supra* note 123.

[133] *Id.*

[134] *See* Carrie A. Bond, *Shattering The Myth: Mediating Sexual Harassment Disputes In Workplace*, 65 FORDHAM L. REV. 2489, 2520 (1997). Indeed, "the mediator is not a judge or an arbitrator." *Id.*

[135] The mediator must be neutral and impartial, knowledgeable in the area of [farmworker labor disputes], and certified by an organization that requires supervised training in the mediation process and adherence of the mediator to the standards of conduct. *See id.* at 2521. Under the proposed AgJobs, the Federal Mediation and Conciliation Service is responsible for providing the mediator. *See supra* note 122. The Federal Mediation and Conciliation Service provides both "problem-solving experience and best-practice approaches to these [workplace disputes] in both the private and public sectors." Federal Mediation and Conciliation Service, The Power of Outside Intervention, http://www.fmcs.gov/internet/itemDetail.asp?categoryID=49&itemID=16607 (last visited Dec. 16, 2005). Also, FMCS has experience mediating "work place and discrimination complaints for numerous federal agencies such as the Departments of Interior, Agriculture, Navy, the Immigration & Naturalization Service, the Equal Employment Opportunity Commission . . . ." *Id.* FMCS' knowledge and expertise in mediation makes it an appropriate choice to administer the AgJobs mediation provision. Having a bilingual person, whether they serve as the moderator or not, is equally as important as having an experienced and knowledgeable mediator in the context of the H-2A worker program. This is imperative because the majority of H-2A workers lack a basic understanding of the English language, and would be disadvantaged if a bilingual person were not present in the room. *See* Bhave, *supra* note 50 (stating that migrant farmworkers lack a basic understanding of the English language). "Mediation is inherently a communication process. There is no greater barrier to communication that the inability to use the same language. Thus, an interpreter is indispensable when communication could not effectively occur otherwise." Ileana Dominguez-Urban, *The Messenger As the Medium of*

importance in the mediation, often serving as the decisive factor to the mediation's success."[136] Selecting a mediator with no knowledge of farmworker labor disputes would waste the time of both the H–2A workers and the farmers. Additionally, proceeding without an interpreter would dissuade H–2A farmworkers from seeking mediation. If H–2A workers are unable to fully participate in the mediation session they will fear the process and make the mediation session useless.

Communication: The Use of Interpreters In Mediation, 1997 J. DISP. RESOL. 1, 6–7. Also important when dealing with interpreter-assisted mediation is the selection of the interpreter. The question of who may interpret is easily answerable. Mediators need to locate qualified interpreters—an independent, professional interpreter. *See id.* at 19. Thus, reliance on friends, relatives, and other ad hoc interpreters would be greatly misguided. *See id.* at 20. Such ad hoc interpreters usually lack the requisite skill needed to serve as interpreters. *See id.* at 21. Moreover, reliance on friends and family members would be misguided because of the potential for biased alterations, and interested interpreters raise concerns about the confidentiality of the communications. *See id.* at 22. Furthermore, the mediator should not act as the interpreter, even if qualified to serve as one. The problems associated with having the mediator serve as the interpreter are twofold. The first problem is "[t]he mediator's concentration will be split among conflicting duties, thereby interfering with the mediator's focus on assisting the parties to resolve their dispute." *Id.* at 23. The second problem is "during rapid or heated exchanges, the mediator would be required to wear two hats simultaneously; the mediator would need to enforce the ground rules as well as interpret the message of each party for the benefit of the other party." *Id.* Equally important as choosing the appropriate mediator is the type of interpretation used. Two types of interpretation are possible; consecutive and simultaneous interpretation. *See id.* at 15. Each type has both positive and negative aspects. For example, consecutive interpretation allows for greater linguistic accuracy, allows interpreters to have greater control over the process of interpretation, and focuses on the speaker's demeanor. *See id* at 15–16. However, consecutive interpretation is more taxing on the interpreter's memory, and it therefore lengthens the proceedings. *See id.* Simultaneous interpretation takes less time, but it disrupts the conversational style of mediation, forces the parties to focus and rely on the interpreter, and is more distracting. *See id.* Most importantly, it is hard to find an interpreter that can perform simultaneous interpretation because it requires the interpreter to interpret and listen at the same time. *See id.* at 16. In the context of mediating H–2A farmworker labor disputes, consecutive mediation should be used because it will allow for greater accuracy because it will give the interpreter "the opportunity to clarify ambiguities, correct errors, request clarification, determine pauses, and adjust their audiences' understanding and reception." *Id.* at 15.

[136] Bond, *supra* note 134, at 2529 (citing David M. Shacter, *To Litigate Or Not?—Time For A.D.R.*, 28 BEVERLY HILLS B.J. 30, 31 (1994).

2. *Meeting with the Parties as Part of the Mediation*

The mediator should meet with the H–2A worker and employer at a convenient location.[137] If the employee resides in housing provided by the employer, the employer or his or her agents should not interfere with the mediator's session with the H–2A worker.[138] The mediator should advise the employer of his presence at the housing upon arrival or beforehand.[139] The mediator should educate the disputants about mediation during this stage of the mediation process.[140] Moreover, it is critical for the mediator to establish his role in the mediation process.[141]

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[137] *See* Searle, *supra* note 123; *see also* CONNIE J. A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS AND FUTURE PROSPECTS 15 (2001) (noting the use of shuttle mediation where the parties meet with the mediator on separate occasions or in separate locations).

[138] *See* Searle, *supra* note 123.

[139] *Id.* One of the benefits of mediation is the ability to privately caucus with the mediator. Generally speaking, caucuses are private meetings that are used by mediators to allow parties the opportunity to vent and cool down when emotions flare up, encourage candor and get the root of an issue, clarify issues, build up trust, encourage momentum if a party is unyielding, help a party determine if a position is unrealistic, and check whether a party has thought through the potential consequences of a probable agreement. *See* STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION 117 (4th ed. 2003); *see also* Emily M. Calhoun, *Workplace Mediation: The First Phase, Private Caucus In Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 189 (2004) (advocating a procedure known as first-phase, private caucus).

> [F]irst-phase, private caucus . . . is a private meeting between mediator and complainant in a discrimination dispute. It is part of the mediation but occurs before negotiation takes place between the parties to a workplace . . . dispute. In mere procedural terms, one might think of the first-phase, private caucus as an adaptation and expansion of the brief, early private meetings commonly used by mediators to familiarize each disputant with the mediation process, and to gather preliminary facts. The first-phase, private caucus, however, serves the qualitatively distinct objective of self-determination in the mediation process and its outcomes.

Id. at 189. "[T]he private caucus . . . will enhance the quality of problem-solving that occurs in mediation . . . ." *Id.* at 191. In the context of H–2A farmworker disputes, using the normal private caucus session or first-phase, private caucus session is very beneficial.

[140] *See* SAM LEONARD, MEDIATION: THE BOOK 113 (1994). Educating the parties involved generally begins with a mediator's opening statement during which the mediator spells out the process. *See id.* The opening statement should contain an explanation regarding the purpose of the mediation, the mediator's role, the development of issues and how they will be addressed, any ground rules, the confidentiality of the mediation, and the goal of the mediation. *See id.* at 113–14. Mediator openings, however, differ from case to case. *See* GOLDBERG ET AL.; *supra* note 139, at 114–15. For example, in commercial disputes the opening statement is brief because the parties will usually have third-party representation and no continuing relationship. *See id* at 114. In an

3. *Scope of Issues for Mediation*

In preparation for mediation, the mediator should contact the parties to develop a written statement of issues to be resolved.[142] The mediation should focus on those issues in the written statement unless other issues are added at the parties' mutual consent.[143] The parties involved should strive to make a good faith effort to mediate, which in turn means that the parties must be willing to compromise on issues for discussion.[144] If the parties fail to make a commitment to mediate in good faith, the dispute is unlikely to be resolved.[145] To ensure that the parties do not negotiate in vain, there should be a representative capable of negotiating and settling for each party.[146]

4. *Presence of Parties and Representation*

The mediator should arrange a time and place to meet that the parties mutually agree upon.[147] The participation and presence of the farmworker and agricultural employer at the mediation session should occur when at all

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interpersonal dispute—where two parties have a continuing relationship—the opening statement should be in more detail in order to demystify the process. *See id.* at 115. Disputes between H–2A workers and their employers would fall under an interpersonal dispute. During this stage of the process the mediator should also inform the parties that they have the opportunity to meet alone in private caucuses and assure them the information will remain confidential. *See id.* at 115.

[141] *See* GOLDBERG ET AL., *supra* note 139, at 114.

[142] *See* Searle, *supra* note 123; *see also supra* notes 112–113 and accompanying text (discussing generally the role of the joint session in mediation).

[143] *See* Searle, *supra* note 123.

[144] *See* Bond, *supra* note 134, at 2521.

[145] *See id.* at 2527.

[146] *See id.* For the farmworker, their presence at the mediation session will be sufficient. However, to ensure that the employer acts in good faith, they should be represented by counsel. Counsel will usually come from a legal service corporation. It should be noted that LSC lawyers disfavor the use of mediation and other forms of ADR. *See* Tina Drake Zimmerman, *Representation In ADR and Access to Justice for Legal Service Clients*, 10 GEO. J. ON POVERTY L. & POL'Y 181, 185 (2003). For the employer, a representative should be sent that can settle on behalf of the employer. *See* Bond *supra* note 134, at 2527. Nevertheless, LSC lawyers should inform H–2A farmworkers of their right to use mediation because "mediation . . . may . . . offer some parties the most effective and efficient means of resolving [the] controversy." Larry R. Spain, *Alternative Dispute Resolution For The Poor: Is It An Alternative?*, 70 N.D. L. REV. 269, 273–74 (1994). Thus, the determination whether to use mediation should be done on a case-by-case basis.

[147] *See* Searle, *supra* note 123.

possible, and the mediator should encourage such participation.[148] In unusual circumstances, alternative arrangements can be made, such as a phone conference or mediation through a legal representative.[149] The parties involved in the mediation should generally have legal counsel at the mediation because of the complexities of the issues involved in most agricultural labor disputes.[150]

5. *Resolution & Agreement*

In mediation, the mediator serves as a neutral and impartial professional to help the parties reach a mutually satisfactory resolution.[151] Also critical to help reach a satisfactory resolution is mediator flexibility.[152] For example, mediators could offer themselves as scapegoats during a joint session by suggesting a ridiculous resolution to the controversy.[153] This will encourage the parties to engage in a meaningful pattern of agreement by uniting to reject the ridiculous proposal.[154]

As the negotiations progress, the mediator should summarize the areas of agreement to motivate the parties to reach a final settlement.[155] As the parties move toward settlement, the mediator should help draft the

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[148] *Id.*

[149] *Id.*

[150] *Id.*; *see also supra* note 146 (discussing generally the role of counsel in mediation disputes). The participation of a lawyer in mediation is encouraged because it can improve the fairness of negotiations in mediation and protect parties from settlement pressures. *See, e.g.*, Nancy H. Rogers & Craig A. McEwen, *Employing the Law To Increase the Use of Mediation and To Encourage Direct and Early Negotiations,* 13 OHIO ST. J. ON DISP. RESOL. 831 (1998). An analogous employment dispute to the H–2A farmworker labor dispute and the use of mediation is the use of mediation in sexual harassment disputes because of the power imbalance present in both disputes. Under the context of sexual harassment, it has been suggested that the mediation process alters the power aspects of the controversy in the favor of the victim, but representation of the victim by counsel will be help by evening the playing field for all parties so that a successful resolution can be reached. *See* Carrie Bond, *Resolving Sexual Harassment Disputes In The Workplace: The Central Role Of Mediation In An Employment Contract,* DISP. RESOL. J., Spring 1997, at 15, 22.

[151] *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 113 (1981) ("More easily than one of those directly involved, a mediator can separate the people from the problem and direct the discussion to interests and options.").

[152] *See* Bond, *supra* note 134, at 2513.

[153] *See id.*

[154] *See id.*

[155] *See* GOLDBERG ET AL., *supra* note 139, at 117.

agreement.[156] A written agreement is crucial to the success of mediation because it assures that all the parties will meet the settlement terms.[157] The actual written agreement should be concise—using both neutral and balanced language without legal terminology.[158] The parties should sign the

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[156] *See id.* Final settlement drafting by a mediator is essential to the settlement process. *See* Nancy H. Rogers & Craig A. McEwen, *Mediation and the Unauthorized Practice of Law*, MEDIATION Q., Spring 1989, at 23, 26. Having the mediator draft the settlement will produce a more workable document than the parties could achieve by themselves, which in turns aids in the compliance of the parties to the settlement. *See id.* However, a settlement agreement is a legal document and "[w]hen a mediator drafts a settlement, his actions go beyond that of a mere scrivener to a craftsman of language." Fiona Furlan, Edward Blumstein & David N. Hofstein, *Ethical Guidelines For Attorney–Mediators: Are Attorneys Bound By Ethical Codes When Acting As Mediators?*, 14 J. AM. ACAD. MATRIM. LAW. 267, 318 (1997). In some instances of mediation, mediators must draft the settlement with an eye toward legal sufficiency, and that action could be deemed as the unauthorized practice of law because even though many mediators are attorneys, others are from other professions, such as therapists and social workers. *See id.* In fact, it might be desirable to have mediators draft settlements that protect the rights of parties because one of the parties may not be able to afford counsel and a total prohibition on mediator drafting could impose hardship upon such parties. *See* Rogers & McEwen, *supra*, at 26. In the context of H–2A guestworkers this is a very real possibility, and allowing a mediator to draft the agreement would ensure that the rights of the H–2A worker are protected if counsel does not represent them.

[157] *See* LEONARD, *supra* note 140, at 125. The written agreement "carves in stone the decisions, intentions . . . of the participants . . . ." *Id.* Having the parties' decisions and intentions in writing is key to mediation's success and continued use. *See* Vernon v. Acton, 732 N.E.2d 805, 810 (Ind. 2000) ("[r]equiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict."). In addition, the agreement that the parties enter into is not a judgment, but rather is a mutually agreed upon settlement that can have a psychological effect on the parties. This is true because "[t]he discussion in mediation . . . can include the broader context of whatever the parties feel is relevant to resolving the dispute, including their past relationship, current circumstances, and *future consequences* that may follow from various solutions." Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 566–67 (1997) (emphasis in original). The parties' greater control over the mediation process and outcome increases fairness of and satisfaction with the process while producing a resolution that is more responsive to the particular interests of the parties. *See id.* at 567. Through mediation the parties motivate themselves to reach an agreement because they have more say in the outcome than they would in a court setting, making the parties generally more satisfied with the settlement and more inclined to make it work. *See id.* at 567. Accordingly, "[p]arties in mediation, compared to those in adjudication, tend to be more satisfied with the process and to see it as more fair." *Id.* at 568.

[158] LEONARD, *supra* note 140, at 125. Once the parties have reached a mutually satisfactory resolution to their problem, the mediator should keep in mind the following

agreement, which then becomes a binding contract.[159] The final mediated agreement should include the settlement of all claims agreed upon as outlined

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factors as they help draft the written agreement: (1) consider the reader and write with that reader's viewpoint in mind, (2) write short sentences, (3) say what you have to say, and no more, (4) use the active voice, (5) use simple "everyday" words, (6) use words consistently, (7) avoid strings of synonyms, (8) avoid unnecessary formality, (9) organize the agreement in a logical sequence, with informative headings, and with a table of contents for long documents, and (10) make the document attractive and designed for easy reading. *See* David C. Elliot, *Writing Agreements in Plain Language*, DISP. RESOL. J., March 1997, at 73, 73. Furthermore, drafting the agreement using neutral and balanced language illustrates that settlement is a fair resolution because in mediation written agreements are not intended to serve as judgments. *See* LEONARD, *supra* note 140, at 125.

[159] Generally speaking, a mediated agreement may be verbal or written. *See* GOLDBERG ET AL., *supra* note 139, at 117. However, it is more desirable to have a mediated agreement memorialized in writing and signed by the parties due to enforcement concerns. Even though the mediation process is informal in nature, a successful outcome leads to a formal settlement agreement enforceable against all involved parties. *See* Joshua S. Rogers, Riner v. Newbraugh*: The Role Of Mediator Testimony In The Enforcement Of Mediated Agreements*, 107 W. VA. L. REV. 329, 330 (2004). Moreover it is possible for the participants in mediation to disagree on what they settled, or even challenge the validity of the agreement. *See id.*; *see also* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 33, 41 (2001). In such instances involving the enforcement of mediated settlement agreements, courts tend to apply traditional contract law principles in order to determine the truth behind each settlement. *See* Rogers, *supra*, at 330. However, some courts have refused to enforce oral settlement agreements. *See Vernon*, 732 N.E.2d at 809–10. In *Vernon*, the parties reached an agreement and at the end of the session, the parties orally agreed that a check and release would be delivered to plaintiff's counsel to complete the deal. However, no settlement agreement was ever signed and one of the parties refused to accept the settlement check and repudiated the mediated agreement. *See id.* at 809. An Indiana appellate court found that there was agreement between the parties. *See* Vernon v. Acton, 693 N.E.2d 1345 (Ind. Ct. App. 1998) *vacated on transfer*. The Indiana Supreme Court reversed the appellate court, stating

> [n]otwithstanding the importance of ensuring the enforceability of agreements that result from mediation, other goals are also important, including: facilitating agreements that result from mutual assent, achieving complete resolution of disputes, and producing clear understandings that the parties are less likely to dispute or challenge. These objectives are fostered by disfavoring oral agreements, about which the parties are more likely to have misunderstandings and disagreements.

Vernon v. Acton, 732 N.E.2d. 805, 810 (2000). The Indiana Supreme Court reasoned that "[r]equiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict." *Id.* A signed written settlement agreement is vitally essential because "[o]nce the full assent of the parties is memorialized in a signed written agreement, the important goal of enforceability is achieved." *Id.* Another possible major hurdle to mediation settlement enforcement arising out of a verbal settlement

in the statement of issues to be resolved, except those issues specifically excluded.

VI. USING SEXUAL HARASSMENT DISPUTES AS A PARADIGM OF MEDIATION'S USEFULNESS

The Farm Mediation Project created by the ODA demonstrates the process and system of mediation that should be used to resolve H–2A farmworker labor disputes. However, the question of whether mediation will benefit H–2A farmworkers lingers. This question remains because the mediation provision proposed by AgJobs is not mandatory.[160] Will the parties actually take advantage of the mediation option, or opt instead for litigation because the mediation option is voluntary?[161] Critics argue that using mediation to resolve these types of disputes is unwise. The following section of this Note, however, will look to the use of mediation to resolve sexual harassment disputes and borrow from that context to conclude that mediation can and should be used to resolve employment disputes between agricultural growers and H–2A farmworkers.

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agreement is confidentiality. Some courts, as was the case in *Vernon*, require memorialized and signed settlement agreements in order to thwart the possibility of having the mediator testify at trial regarding the intent of the parties. By making this evidence inadmissible courts are protecting mediation confidentiality, but the ability of the courts to enforce mediated agreements may infringe on the confidentiality of mediation communications. *See* James J. Alfini & Catherine G. McCabe, *Mediating In The Shadow Of The Courts: A Survey Of The Emerging Case Law*, 54 ARK. L. REV. 171, 174–75 (2001). This creates a lose-lose situation because it protects mediation confidentiality, but also undermines the effectiveness of mediation if some settlement agreements cannot be enforced. *See id.* at 174. In fact, mediation's core principles could become compromised as this consensual, flexible, and informal process is integrated into the legal system. *See id.* at 173. To ensure that mediated settlement agreements are enforced by courts and not at the expense of the parties' rights, mediators should write the agreement and have the parties sign it.

[160] *See* AgJobs 2005, *supra* note 88; *see also* AgJobs 2004, *supra* note 91, § 218C(c)(1) ("Upon the filing of a complaint by an H–2A worker . . . a party to the action *may* file a request with the Federal Mediation and Conciliation Service to assist the parties in reaching a satisfactory resolution of all issues involving all parties to the dispute.") (emphasis added). *Id.*

[161] Mediation programs that depend on parties' willingness to participate attract relatively few cases, even when offered at low or no cost. *See* Wissler, *supra* note 157, at 570.

A. *Power Imbalance Between the Parties*

A Legal Aid attorney will likely handle the case in almost any dispute involving an H–2A farmworker. Legal Service Corporation (LSC) attorneys generally disfavor using any form of dispute resolution other than litigation.[162] There are a number of reasons why LSC attorneys tend to use litigation. First, many LSC attorneys are poorly informed about ADR procedures and how to use those procedures effectively.[163] In addition, LSC attorneys have a need and desire to set legal precedent, which in turn makes litigation's right-and-wrong determination on facts more attractive than a "compromise" in mediation.[164] In fact, many LSC attorneys see litigation as the only way to achieve a just result for people who have been mistreated.[165] Furthermore, LSC attorneys are reluctant to use mediation because of the perception that it can be seen as a sign of weakness.[166]

In addition to attorney reluctance, the significant imbalance of power between H–2A farmworkers and their employers is another obstacle that will make the parties reluctant to use the mediation provision.[167] Critics of

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[162] *See generally* Zimmerman, *supra* note 146, at 183–85.

[163] *See id.* at 183.

[164] *See id.* at 184.

[165] *See id.* Attorneys and other commentators have suggested that mediation is a form of "second class justice." *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986). Commentators have suggested that judges use mediation improperly as a method to clear their dockets of insignificant cases. *Id.* As a result of mediation, poor people, those who need access to the court system the most, are denied access in favor of more complex cases involving those with money and power. *See id*; *see also* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases),* 83 GEO. L.J. 2663, 2669 (1995) (describing the preference for litigation over ADR as "litigation romanticism" based on empirically unverified assumptions about what courts can or will do). *But see* Spain, *supra* note 146, at 271 (stating that mediation can increase an individual's access to a forum that can adequately resolve disputes).

[166] *See* Zimmerman, *supra* note 146, at 184. In the adversarial model, attorneys may be reluctant to suggest mediation as an alternative to litigation to their clients because they fear the other side will view the request of mediation as a sign they have a weak case. *See* Edwards, *supra* note 165, at 670. Given the competitive nature of the adversarial system, where weakness is commonly exploited, this is a legitimate concern, but an experienced attorney should be able to frame the request for mediation in a way that does not show a sign of weakness. *See* Zimmerman, *supra* note 146, at 184. For example, the requesting mediator could pose the request for mediation as a desire to minimize the amount of time and money spent on resolving the issue. *See id.* at 189–90 (stating that the time and cost associated with mediation is considerably less than litigation).

[167] *See* Spain, *supra* note 146, at 273.

mediation argue that poor parties rarely have equal power and resources, and using mediation will not reduce this disparity in power.[168] This contention has merit,[169] but the determination of whether to use mediation should not depend on such a broad generalization.[170]

When faced with an imbalance of power between the parties, mediation can work because it is the mediator's job to structure the mediation session to account for any power imbalance between the parties.[171] For example, the mediator can suspend the initial joint meeting so that the parties are not forced to negotiate face-to-face at the beginning of the mediation session, or never require the parties to meet face-to-face due to the sensitivity of the issues involved.[172] In fact, disputing parties have used mediation to resolve disputes that are sensitive in nature and involve a disparity in power.[173]

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[168] *See* Edwards, *supra* note 165, at 679.

> Inexpensive, expeditious, and informal adjudication is not always synonymous with fair and just adjudication. The decision makers may not understand the values at stake and parties to disputes do not always possess equal power and resources. Sometimes because of this inequality and sometimes because of deficiencies in informal processes lacking procedural protections, the use of alternative mechanisms will produce nothing more than inexpensive and ill-informed decisions.

Id.

[169] Mediation should not be the used in cases involving physical abuse. *See* Zimmerman, *supra* note 146, at 186. For example, cases involving domestic violence should not use mediation. *See* Kelly Rowe, *The Limits of the Neighborhood Justice Center, Why Domestic Violence Cases Should Not Mediated*, 34 EMORY L.J. 855, 864 (1985). Rowe states three reasons why mediation is unlikely to make a difference in spouse abuse claims. The first reason is the passivity and learned helplessness of battered woman. Second is the non-mutual nature of the violent behavior. Third is the seriousness of the spousal violence that is more accurately defined as a crime rather than dispute. *See id.* In the context of this type of situation, mediation would be inappropriate because part of the essential character of mediation is the avoidance of attaching blame, which is counter–intuitive to helping spousal abuse victims. *See id.* at 865. In fact, spousal abusers must accept responsibility for their violent behavior for it to change. *See id.* at 866. Because of this, if an H–2A worker has been subject to physical abuse, the more appropriate course of action would be to seek criminal charges, instead of using mediation to resolve the dispute.

[170] For most cases, determining whether to use mediation should be done on a case-by-case basis. *See generally supra* note 146.

[171] *See* Bond, *supra* note 134, at 2515.

[172] *See id.* at 2516.

[173] For example mediation has been used to resolve divorce cases. *See* STEPHEN K. ERICKSON & MARILYN S. MCKNIGHT, THE PRACTITIONERS GUIDE TO MEDIATION 77 (2001). Mediation has also been used to resolve sexual harassment employment disputes. *See generally* Bond *supra* note 134. A quick examination of sexual harassment will be helpful because sexual harassment closely resembles the power imbalance between farmworkers and their employers.

1. *The Sexual Harassment Paradigm*

Sexual harassment is an excellent paradigm because there are shared characteristics between alleged victims of sexual harassment and H–2A farmworkers. For example, the alleged victim in a sexual harassment case is most likely a woman with low income, little education, and little power.[174] In the H–2A farmworker context, the majority, if not all, of H–2A farmworkers are poor, uneducated, and lacking any power to change their situation on their own. Moreover, victims of sexual harassment express serious concern about some form of retaliation or adverse consequences flowing from their complaint.[175] One of the major reasons H–2A farmworkers fail to seek redress for violations of their rights is the fear of employer retaliation for "complaining."[176]

The use of mediation to resolve sexual harassment disputes demonstrates that H–2A farmworkers and their employers can use nontraditional solutions to resolve their disputes.[177] Instead of the parties placing blame on each other for the dispute, mediation enables the parties to create solutions other than punishment.[178] In the H–2A farmworker context this is beneficial because the worker needs to retain his or her job.[179] In a highly sensitive area such as a sexual harassment employment dispute, mediation is proven to work, and this Note will borrow from that context and focus on specific reasons why mediation will benefit H–2A farmworkers.

i. *Mediation Versus Courtroom*

Electing to mediate a dispute will provide a comfortable forum for all parties and is more likely to facilitate a workable resolution to the dispute than an adversarial process involving rights adjudicated in a formal setting under a fixed set of rules.[180] In the sensitive H–2A employment environment, electing to mediate disputes will allow the injured H–2A farmworkers to

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[174] *See* Bond, *supra* note 134, at 2500.

[175] *See id.* at 2501

[176] *See supra* notes 43–44 and accompanying text (discussing employer retaliation).

[177] *See* Edward J. Costello Jr., *The Mediation Alternative in Sexual Harassment Cases,* ARB. J., Mar. 1992, at 16, 21. Costello notes that "[i]n mediation, the remedies are limited only by the imagination and willingness of the parties, their counsel, and the mediator." *Id.*

[178] *See* Bond, *supra* note 134, at 2517.

[179] *See supra* note 44 (discussing the need for H–2A farmworkers to retain employment). It is possible for employers to use this mediation option to their advantage.

[180] *See* Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156 (1999).

assert their claims and confront their employer without fear of retaliation.[181] Mediation will also allow the employer to attack the problem head on and obtain feedback without fearing its position will be misconstrued.[182] Another advantage of choosing mediation over litigation is that "[m]ediation provides a confidential forum for resolving disputes without revealing publicly the intimate and embarrassing details of conduct that might otherwise have to be disclosed in adjudication."[183] Choosing to litigate a dispute can create problems because Latinos are generally passionate about machismo, honor, and sensitive to criticism.[184] Opening up personal problems for critique could possibly lead to many H–2A farmworkers electing to sit on their complaints instead of seeking redress for their injuries. In the context of H–2A employment disputes, mediation will work to resolve these disputes because "mediation is designed to put the parties at ease in the context of exploring their interests and needs."[185]

ii. *Adaptability of Mediation*

Mediation provides for procedural adaptability and outcome flexibility.[186] The range of remedies available to the parties is only bound by their creativity.[187] Flexibility in crafting settlement agreements can benefit agricultural employers because settlement agreements "that flow from a private agreement may be easier to swallow than the same or even less rigorous requirements embodied in a judgment or a consent decree."[188] The flexibility in mediation should serve as a financial incentive for employers to participate in mediation to avoid liability at the high end of the damage scale in mediated settlements.[189]

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[181] *See id.* at 156–57; *see also supra* notes 43–45 (discussing generally an H–2A farmworkers fear of employer retaliation).

[182] *See* Harkavy, *supra* note 180, at 157.

[183] Harkavy, *supra* note 180, at 157.

[184] *See* Howard H. Irving, Michael Benjamin & Jose San-Pedro, *Family Mediation and Cultural Diversity: Mediating with Latino Families*, 16 MEDIATION Q. 325, 327–30 (1999).

[185] Harkavy, *supra* note 180, at 158.

[186] *See id.*

[187] *See id.*

[188] *See id.*

[189] *See id.*, at 159; *see also* Carrie Menkel–Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999) (discussing the repeat players (employers) who attempt to maximize their long–term gains over those "one-shotters" who may seek justice, but participate with fewer resources).

In addition to the financial incentive to mediate, employers should elect to mediate rather than litigate disputes because it will save time. Employers have noted that saving time is a substantial benefit of mediation.[190] For example, an Equal Employment Opportunity Commission pilot program involving mediation of employment discrimination suits found that in-house mediation lasts anywhere from one-half hour to six hours.[191] More specifically, the time it took to resolve disputes in the pilot program took about three-and-a-half hours.[192]

In addition to the flexibility mediation offers employers, choosing mediation to resolve a dispute does not foreclose an H–2A farmworker's right to seek relief through the courts because there is no binding outcome in mediation unless the parties agree to it.[193] The non-binding aspect of mediation is important because of the concerns associated with other forms of ADR that tend to favor repeat players.[194] As stated earlier, mediation is not binding until the parties reach a settlement,[195] and the dangers associated with repeat players are not present in mediation.

Mediation is an excellent mechanism employers can utilize to resolve workplace disputes.[196] The employer benefits from using mediation over litigation or arbitration because of mediation's remedy scheme, which is the

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[190] *See* Allison Balc, *Making It Work at Work: Mediation's Impact On Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L.J. 241, 249 (2002).

[191] *See id. at* 250

[192] *See id.* The shorter amount of time it takes to resolve a dispute through mediation is attributed to the fact that the parties began discussion "before antagonistic positions have solidified around doctrinal arguments and litigation tactics." *Id.* Indeed, it would make sense that mediation would take a shorter amount of time because it does not impose a discovery phase or motion deadlines that can drag litigation out over many months.

[193] *See* Nancy A. Welsh, *The Place of Court-Connected Mediation In a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 136 (2004).

[194] *See generally* Menkel–Meadow, *supra* note 189. Menkel–Meadow discusses the dangers associated with repeat players in employment arbitration that is often mandatory. Menkel–Meadow suggests that repeat players favor ADR, particularly arbitration, because they can "maximize long-term gain by resisting settlements, developing advance intelligence, and being able to plan for future engagement." *Id.* at 27 In addition, repeat players are not worried about losing one or two cases because they can "cultivate a 'bargaining or litigation reputation' to accomplish particular goals or simply to develop trust and legitimacy with court personnel, developing long–term relationships with institutional incumbents, by participating actively in procedural as well as substantive rule construction and adoption." *Id.* Menkel-Meadow later discusses alternatives to arbitration, one of which is non-binding mediation. *See id.* at 47.

[195] *See* Welsh, *supra* note 193.

[196] *See* Bond, *supra* note 134, at 2518

opposite of litigation's and arbitration's "all or nothing" dispute resolution model.[197] Mediation reduces the possibility that the employer will be sacked with a highly inflated jury verdict.[198] Accordingly, an agricultural employer will not choose mediation to take advantage of the system, but rather to cut time and keep costs down by avoiding litigation, which could result in a high-end jury verdict.[199]

B. Recommendation: Improving the Mediation Option In AgJobs

The mediation proposed in AgJobs is voluntary and is not mandatory, or court-annexed, mediation.[200] Court-annexed or mandatory mediation appears to be the more suitable choice to resolve disputes because courts order the parties to the mediation table, eliminating the voluntary nature of mediation. Under the mandatory system, dissatisfied parties can refuse to settle following mediation and thus preserve their rights to litigate in a traditional forum.[201] Indeed, both the state and federal courts and governmental agencies use the court-annexed model of mediation to resolve disputes.[202] However, this Note will argue that the current voluntary mediation provision in AgJobs should remain voluntary and not be changed to encompass court-annexed or mandatory mediation.

1. *Voluntary Mediation*

The defining characteristics of mediation are the "values of self-determination and accountability."[203] In fact, mediation has become increasingly popular because of these values, which emphasize the central role parties play in disputes.[204] The parties negotiate directly with each other, identify the issues to be discussed, determine the substantive norms that are legitimate and relevant, create options for settlement, and control the final

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[197] *See id.*

[198] *See id.*

[199] *See id.*

[200] "Court-annexed ADR involves judicial referral of cases to pretrial ADR processes, while the court preserves the rights of the parties to go to trial if the results do not satisfy them." Note, *Mandatory Mediation and Summary Jury Trial: Guidelines For Ensuring Fair and Effective Process*, 103 HARV. L. REV. 1086, 1087 n.10 (1990).

[201] *See id.*

[202] *See* Harkavy, *supra* note 180, at 154 (discussing generally the use of ADR in both state and federal courts).

[203] *See* Welsh, *supra* note 193, at 136.

[204] *See id.* at 135.

decision regarding whether or not to settle and on what terms.[205] Although court-annexed mediation retains some of these characteristics, it has, however, changed mediation in a substantial way. For example, court-annexed mediation has transformed mediation so that mediators act as another set of judges that decide disputes.[206]

When mediation becomes mandatory the parties lose the ability to decide for themselves whether or not to try mediation.[207] Moreover, as attorneys have become more frequent participants in mandatory mediation sessions and have assumed responsibility for selecting mediators, the process has become less focused on empowering the parties and more focused on forcing the parties to confront and reconcile the legal, bargaining, and transactional norms of the courthouse.[208] In mandatory mediation, the attorneys and mediators dominate the discussion and negotiation in mediation sessions.[209] These changes in mediation have the effect of constricting, rather than celebrating, parties' ability to engage in self-governance and demand accountability from the mediators, the mediation process, and mediated outcomes.[210]

However, to ensure that mediation is not used as a tool against an H–2A farmworker, courts should exercise quality control by carefully scrutinizing mediated settlement agreements, particularly when one of the parties objects to enforcement of the agreement or seeks to set it aside.[211] In this regard, the court should view mediators as agents of the court, establishing expectations beyond settlement for their mediators.[212] Moreover, courts "should assign staff to monitor mediators' performance through periodic observations, distribution and assessment of meaningful post-mediation surveys and interviewing of attorneys and parties."[213]

Other ways of ensuring a fair process include requiring courts to review and approve mediated settlement agreements.[214] Also, courts "should provide a short cooling-off period for mediated settlement agreements, during which the parties themselves could evaluate the fairness of the outcome—using

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[205] *See id.*

[206] *See id.* at 136.

[207] *See id.* at 137.

[208] *See id.*

[209] *See id.* at 138.

[210] *See id.*

[211] *See* Welsh, *supra* note 193, at140.

[212] *See id.* at 142.

[213] *Id.*

[214] *See id.* at 143.

whatever norms they deem legitimate—and choose to accept or rescind their agreements without penalty."[215]

VII. CONCLUSION

> Capitol and labor together produce the fruit of the land. But what really counts is labor: the human beings who torture their bodies, sacrifice their youth and numb their spirits to produce this great agricultural wealth—a wealth so vast that it feeds all of America and much of the world. And yet the men[,] women and children who are the flesh and blood of this production often do not have enough to feed themselves. [216]

The guest worker programs employed by domestic farmers to fill the gap of "unavailable domestic workers" show that foreign workers are often placed at the mercy of their employers.[217] The evidence shows the dependency foreign workers have on their employers when they enter into the employment contract. Indeed this is the nature of the H–2A guest worker program. The United States government, the creator of the guest worker program, has passed legislation to correct the abuse of foreign workers by their employers, and AgJobs is an example of this legislation.

The revised H–2A guest worker program will allow for greater protection of H–2A farmworkers' rights. It is a step in the right direction because it allows aggrieved H–2A farmworkers to sue in federal court. However, the most important aspect of AgJobs that is often overlooked is the availability of mediation to resolve employment disputes. Mediation will allow H–2A farmworkers to empower themselves to the extent that H–2A farmworkers are no longer subject to the mercy of their employers. Given the history of the guest worker programs in this country, agricultural employers are apt to abuse the system.

As this Note has highlighted, the Latino culture, which many H–2A farmworkers call their own, tends to promote conflict avoidance and negative reactions to criticism.[218] These two features of the Latino culture can make engaging in a process that has been transformed into quasi-adversarial adjudication of disputes a negative rather than positive experience. It is the suggestion of this Note that the mediation option in the AgJobs bill remains voluntary. The voluntary aspect of mediation will allow the parties to choose

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[215] *Id.*

[216] Cesar Chavez, Eulogy for Rufino Conteras (Feb. 14, 1979), *available at* http://www.ufw.org/erc.htm.

[217] *See supra* notes 50–55 (discussing generally H–2A workers' fear of retaliation from their employers).

[218] *See supra* notes 186, 188 and accompanying text.

mediation in good faith. H–2A farmworkers will choose mediation over litigation because it will give them an avenue to seek redress, while also preserving their employment. Moreover, if an employer elects to mediate disputes he will do so in good faith because of the costs and time saved. Accordingly, by leaving in the background the possibility of litigation, H–2A employers will come to the mediation table and mediate in good faith.